THE COMMITTEE ON ENERGY AND COMMERCE

INTERNAL MEMORANDUM

August 5, 2011

To: Subcommittee on Oversight and Investigations

From: Committee Majority Staff

Subject: Field Hearing Entitled "EPA's Takeover of Florida's Nutrient Water Quality Standard Setting: Impact on Communities and Job Creation"

On Tuesday, August 9, 2011, at 10:00 a.m. at the Alumni Center, The University of Central Florida, 4000 Central Florida Boulevard, Building 126, Orlando, Florida 32816, the Subcommittee on Oversight and Investigations will conduct a field hearing entitled "EPA's Takeover of Florida's Nutrient Water Quality Standard Setting: Impact on Communities and Job Creation." The hearing, which is the sixth hearing in the Subcommittee's Regulatory Reform Series, will focus on the impacts of the Environmental Protection Agency's (EPA) recent rulemaking for the State of Florida, which set federal numeric nutrient water quality criteria for lakes and flowing waters for Florida, and which overruled Florida's own process for setting the relevant standards.

I. Witnesses

Panel I

Gwendolyn Keyes Fleming
Regional Administrator, Southeast Region
Environmental Protection Agency

Richard Budell
Director, Office of Agricultural Water Policy
Florida Department of Agriculture and Consumer Services.

Panel II

Paul Steinbrecher
President
Florida Water Environment Association Utility Council

Kelli Hammer Levy
Watershed Management Section Manager
Department of Environment and Infrastructure, Pinellas County, Florida

William Dever
President
Florida Gulf Coast Building and Construction Trades Council

Ron St. John
Alliance Dairy

David Richardson
Assistant General Manager for Water and Wastewater
Gainesville Regional Utilities

II. Background

Phosphorous and nitrogen are key nutrients present naturally in water bodies and are necessary for the biological health of these aquatic systems. Nevertheless, excess concentrations of nutrients, which can be introduced by man-made activity, may negatively impact the health of water bodies and the public health. Excessive nutrient "loading" can effect water quality and public health in a number of ways, e.g., by causing noxious tastes and odors in drinking water or producing algal blooms, which can harm fish and other aquatic life as well as negatively impact tourism and recreational activities, such as boating and swimming.

The determination of appropriate levels of nutrients for protection of water quality is very complex, and implementation of that protection poses serious challenges. For example, as the Florida Department of Environmental Protection (FDEP) explains, there is considerable variability and uncertainty in predicting nutrient effects in many aquatic systems.[1] Setting numeric limits for the amount of nutrients that cause undesirable effects is dependent on many natural, site-specific factors such as water chemistry, sunlight, flow and temperature. Nutrient levels that cause a negative effect in one water body may not cause the same effect in another water body. Establishing a cause and effect relationship between nutrient levels and negative effects on water quality to establish appropriate nutrient numerical levels is thus site-specific, time-consuming, and expensive. At the same time, many States prefer *narrative* nutrient water quality standards[2] because such standards give them flexibility in dealing, on a site-specific basis, with a variety of nutrient-related water quality issues as they arise.

Florida currently uses a narrative nutrient standard to guide the management and protection of its waters. The narrative standard states, among other things, that "in no case shall nutrient concentrations of body of water be altered so as to cause an imbalance in natural populations of flora or fauna." This water quality standard serves to guide State regulatory

[1] For background on Florida nutrient standard setting, see www.dep.state.fl.us/water/wqssp/nutrients/.
[2] Under the Clean Water Act, States establish water quality standards for the overall quality of water. They consist of the designated beneficial use or uses of a waterbody (recreation, water supply, industrial, other), plus a numerical or narrative statement identifying maximum concentrations of various pollutants that would not interfere with the designated use. Waters that do not meet the standards are considered "impaired," and require the establishment of total maximum daily load (TMDL) of pollutants and that they be subject to pollutant load reductions to restore water quality. See *Clean Water Act: A Summary of the Law*, Congressional Research Service, (RL30030) and *Clean Water Act and Total Maximum Daily Loads (TMDLs)*, Congressional Research Service, (97-831).

measures to control both nonpoint source (land use and stormwater drainage) and point-source (industrial and sewage treatment) discharge of nutrients into water bodies.

Despite the unique nature of nutrients and the challenges inherent in using numerical standards to determine nutrient water quality, EPA seeks to force States to establish numerical water quality standards (or criteria) for nutrients. In response, Florida initiated an effort in 2001 to develop numeric nutrient criteria for Florida waters. Concluding that EPA's recommended national criteria were scientifically indefensible, Florida initiated its own scientific research effort to develop numeric nutrient standards that are reflective of the diversity of Florida's waters. In September 2007, EPA approved Florida's plan for developing numeric nutrient criteria. Florida's plan had a projected completion date of early to mid-2011.

In July 2008, a number of environmental advocacy organizations sued EPA for failure to set its own numeric nutrient criteria for Florida. In January 2009, EPA abruptly reversed its position with regard to Florida's standard setting process and determined that EPA would have to issue its own nutrient standards for Florida to comply with the Clean Water Act, preempting the State's delegated authority in the matter. At this point, Florida had neither abandoned its effort nor even submitted criteria or implementation plans which EPA had disapproved. Nevertheless, in August 2009, EPA, without State involvement, entered into a Consent Decree with certain environmental advocacy organizations in which the Agency agreed to issue rules establishing numeric nutrient criteria for Florida by certain dates.

EPA proposed its numeric nutrient criteria for lakes, rivers, and streams in Florida in January 2010, and promulgated final federal standards in November 2010. These standards are scheduled to become effective in Florida in March 2012. EPA also committed to propose numeric nutrient criteria for Florida's estuarine, coastal, and southern inland flowing waters by November 2011, and establish final standards by August 2012. These federally-promulgated standards, which establish benchmark nutrient values that all covered waters must meet, are not linked to specific cause and effect relationships indicating impairment in particular water bodies.

There is widespread controversy over EPA's actions to impose standards without regard to Florida's own judgment of what standards would be effective. Questions have been raised about the necessity of the EPA rulemaking, the quality of the analysis supporting its decisions, and the Agency's cost estimates for complying with its federal numeric standards. The State of Florida's initial $5.7 billion to $8.4 billion annual cost estimate for implementing EPA's standards is 20 to 40 fold higher than EPA's estimates. A study by the Florida Department of Agriculture and Consumer Services concludes that Florida's agricultural community will lose 14,545 full-time and part-time jobs and lose $1.148 billion annually. The natural resource economics consulting firm Cardno ENTRIX analyzed EPA's estimates for a coalition of business and industry, and placed the total annual costs at $1 billion to $8.4 billion, noting that the benefits associated with EPA's new water quality standards are uncertain.[3]

On April 22, 2011, FDEP filed a petition with EPA, requesting that EPA withdraw its January 2009 "Necessity Determination" that federal numeric nutrient standards are necessary in Florida waters; rescind its federally-promulgated rules; and restore to Florida its responsibility

[3]Economic Analysis of the Proposed Federal Numeric Nutrient Criteria for Florida, Cardno ENTRIX, November 2010.

for the control of excess nutrients, including the pursuit of nutrient standards. The petition outlined plans and a rulemaking schedule by which FDEP would complete development and adoption of numerical nutrient standards. The petition also documented that Florida had comprehensively addressed the eight most crucial elements EPA believes are necessary for a State program to effectively manage nutrient pollution. If granted, this petition would enable Florida to continue developing scientifically defensible standards for the State.

On June 13, 2011, EPA responded by letter, in an "initial response," to Florida's petition. EPA said it was neither granting nor denying the petition, but said it is prepared to withdraw its federal nutrient standards, and to delay promulgating estuarine criteria in Florida if the State develops and adopts its own adequate standards. EPA said it was holding its final response to the petition "in abeyance," pending the outcome of Florida's development of standards. This appears consistent with EPA's June 24, 2011, response to Subcommittee Chairman Cliff Stearns's letter of April 21, 2011, stating that "if FDEP adopts and EPA approves protective nutrient criteria that are sufficient to address the concerns underlying the January 2009 determination and the numeric nutrient criteria rule, and if such criteria enter into legal force and effect in Florida, the Agency will promptly initiate rulemaking to repeal the correspondingly federally promulgated numeric nutrient criteria."

III. Issues

Issues to be examined at the hearing may include:

- What are the economic and regulatory impacts of EPA's standards on communities and job creation in Florida?

- What impacts would EPA's numeric nutrient water quality standards have on the water quality of Florida's waters?

- What is the status of Florida and its municipalities' efforts to improve nutrient water quality and how have EPA's actions affected these efforts?

IV. Staff Contacts

If you have any questions regarding this hearing, please contact Peter Spencer or Sam Spector of the Majority Committee staff at (202) 225-2927.